(1) Supreme Court, U.S.
FILED

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In The

SUPREME COURT of the UNITED STATES

October Term, 1997

LEMUEL H. COX,

Petitioner,

vs.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court's opinion below abridges the plaintiff's right to a jury trial in violation of Title VII of the Civil Rights Act of 1964, as Amended in 1991, and by abridging the plaintiff's right to have a jury determine issues of fact and credibility pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whether the court's opinion below conflicts with this Court's prior holdings by changing the plaintiff's burden of proof in an employment discrimination case requiring him to produce direct evidence of intentional discrimination.

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Petitioner, Lemuel Cox, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an affirmed but unpublished, per curiam opinion. (App. A). The opinion of the district court is not published, but can be found at No. 2:95CV678 (M.D.N.C. Dec. 10, 1996). (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 1, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act [29 U.S.C. 623(a)] provides in relevant part:

> "it is unlawful for an employer to discriminate against an employee with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age".

Federal Rule of Civil Procedure 56 provides in pertinent part:

> Summary Judgment is appropriate when the motion papers, affidavits, and other evidence submitted to the court show that no genuine issue exists as to

any material fact, and that the moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

The fundamental questions in this case are: (1) whether the Court's opinion below abridges the plaintiff's right to a jury trial in violation of Title VII of the Civil Rights Act of 1964 as amended in 1991, and by abridging the plaintiffs right to have a jury determine issues of fact and credibility pursuant to Rule 56 of the Federal Rules of Civil Procedure, and (2) whether this Court's holding in *St. Mary's vs. Hicks* changed the plaintiff's burden of proof in an employment discrimination case, requiring him to produce direct evidence of intentional discrimination. It arises in the context of the district court's granting of the school board's motion for summary judgment on the ground that the plaintiff failed to present sufficient evidence of pretext even though he proved a prima facie case of age discrimination in employment.[1]

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE COURT'S PRIOR HOLDINGS, AND ABRIDGES THE PLAINTIFF'S RIGHT TO A JURY TRIAL IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT AS AMENDED IN 1991, AND CONFLICTS WITH RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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[1] The district court found that for purposes of summary judgment plaintiff had successfully proven a prima facie case of discrimination.

With the passage of the 1991 amendments to the Civil Rights Act of 1964, Congress granted plaintiffs in employment discrimination cases the right to a jury trial. This exceedingly important privilege has created some confusion, when read in context with this Court's holding in *St. Mary's vs. Hicks*, as to whether the court may resolve issues of fact and credibility at the summary judgment stage.

This petition arises from the Fourth Circuit's affirmation of its lower court's decision to summarily dismiss this petitioner's age discrimination case. Petitioner, like a significant number of other plaintiffs, has fallen victim to the Fourth Circuit's appalling disregard for the rights guaranteed by Title VII and the Federal Rules of Civil Procedure. Justification for its affirmation is allegedly found in this Court's opinion in *St. Mary's vs. Hicks*.

In *St. Mary's*, this Court stated,

> [T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof, *Burdine*, 450 U.S., at 252[101 S.Ct., at 1093], in deciding this ultimate question." *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482.

The Fourth Circuit's interpretation of this passage effectively empowers the Court to resolve issues of fact and credibility. We believe this is an incorrect interpretation not only because it conflicts with the holding in *St. Mary's*, but also because it offends traditional notions of fairness and substantial justice.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure (App. E), in ruling on a motion for summary judgment, the court will never weigh the evidence or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to the material facts requiring a trial. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The court will not weigh the credibility of witnesses or other evidence in ruling on a motion for summary judgment. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the jury. *Id.* At 255, 106 S.Ct. at 2513. All facts must be viewed in the light most favorable to the plaintiff, drawing all justifiable inferences in his favor. *Eastman Kodak Co. vs. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

In spite of the foregoing, the Fourth Circuit Court of Appeals has abandoned these well settled rules, insisting that St. Mary's authorizes a different application of the law as it pertains to summary judgment in the context of discrimination cases. While it continues to articulate the traditional principles of summary judgment, it steadfastly affirms its lower courts misapplication of these rules. (App. A).

In the present case, the respondent stated two very distinct reasons for rejecting the petitioner; (1) because he did not hold a specific degree in health education and therefore, by statute, the school would not receive a grant from the state for funding the

position, and (2) because the selected candidate was viewed as more qualified to oversee the curriculum regarding sex education.

The petitioner responded to the first contention by pointing out that N.C.G.S. § 115C-81(e), the statute relied upon by the respondent, (App. F) did not apply to him. It states in pertinent part,

> Each person initially employed as a State-funded school health coordinator after June 30, 1987, shall have a degree in health education.

First of all, Petitioner began his employed with the school system in 1961, and had not been initially hired after 1987. Second, the changes to the curriculum wherein health and physical education were separated into different curriculums initially occurred in 1972.[2] Consequently, in 1981 petitioner requested and received a written waiver from the Department of Public Instruction releasing him from the requirement of having to hold a specific degree in health. (App. J,K,L). Moreover, he had previously held the position for which he was rejected with the Greensboro City Schools for thirty (30) years. Each year the school system received funding from the state.

The petitioner responded to the defendant's second articulated legitimate, non-discriminatory reason for his rejection by showing that he was more qualified than the selectee. He did so not only by producing an extensive list of credentials and accomplishments,[3] but also by raising a suspicion of mendacity regarding respondent's reasons for his rejection.

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[2] Petitioner has a degree in health and physical education.

[3]The record is replete with documented evidence of petitioners qualifications, including performance evaluations, but is too voluminous to be included in the appendix.

When the defendant contended that the physical education aspect of the position of Curriculum Specialist in Health and Physical Education was irrelevant for purposes of evaluating the better candidate, the plaintiff responded with the production of the 1994 job description for the position of Curriculum Specialist in Health and Physical Education which indicates the dual nature of the essential functions of the position.[4](App. G).

Facts offered by the petitioner as probative of age discrimination were likewise disregarded by the court. The respondent was clearly looking for diversity, and it already had a central office administrative staff comprised primarily of individuals over age forty (40) years. The respondent was concerned about image, in that it was looking for someone who would be viewed by the public as fully capable of overseeing the health curriculum. (App. H). The most revealing evidence of the employer's true motive was the respondent's articulated goal of cutting costs. In a school system where age and salary are invariably related, it is much more costly to employ older individuals. Such was the case here. The school system, by hiring the younger candidate, was able to reduce cost by approximately one-half (1/2).[5]

The Court, nonetheless, viewed all of the aforementioned facts in the light most favorable to the respondent, thereby dismissing all of plaintiff's evidence, and labeling it as "speculative and unsubstantiated". It likewise resolved issues of fact and credibility, and drew all inferences in favor of the defendant. (App. B).

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[4] It is important to note that the job description was written almost one after the petitioner was rejected. A question is raised as to why the school board did not change the description to reflect the changes in the health curriculum, and the exclude the essential functions relating to physical education.

[5] Respondent argued that this could have been a sex discrimination case; however, the fact of the candidates' sex was not of consequence to achieve it's goal. Even if Petitioner had been a woman, the salary would have been the same because it is related to age.

The court's actions clearly offend long-standing principles regarding its role at summary judgment. Nothing in this Court's opinion in *St. Mary's* indicates otherwise. The passage relating to the court's role was written in the context of a bench trial, and must not be read as alienation of prior court holdings on the standard of review at summary judgment. It changes neither the court's role with regard to issues of credibility, nor with regard to the resolution of ultimate questions of fact. These responsibilities remain reserved for a jury.[6]

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE PLAINTIFF'S BURDEN OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION.

The majority opinion rendered by this Court in *St. Mary's vs. Hicks*, 113 S.Ct. 2742 (1993) effectively changed the manner in which the Fourth Circuit Court of Appeals views the plaintiff's burden of proof in an employment discrimination action. The present action exemplifies the aftermath of the majority opinion in *St. Mary's*, and poses the question of how a plaintiff can prove "both that the employers reason(s) for its employment decision(s) was false, and that discrimination was the real reason".

Prior to *St. Mary's*, that question appeared to have been answered convincingly. In *Burdine*, the Court stated:

> "[The plaintiff] may succeed in this [i.e., in persuading the court that she has been a victim of

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[6] The petitioner also sued under N.C.G.S. §143-422.2, which essentially mirrors the "ADEA". This petition also applies to the courts similar actions regarding that claim.

> intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence".

This Court further noted:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and upon such rejection, no additional proof of discrimination is required," *Id.* at 493.

Finally, this Court appeared to reaffirm *Burdine* when it stated in *St. Mary's,* "we must agree with the dissent on this one: The words bear no other meaning but that the falsity of the employer's explanation is alone enough to compel judgment for the plaintiff". *St. Mary's* at 27529 quoting *Texas Dept. of Community Affairs vs. Burdine.*

Notwithstanding the ostensible clarity of that reaffirmation, much confusion had been generated by this Court's subsequent comments:

> "once the defendant 'responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must decide" not whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of

> Title VII." *St. Mary's* at 2753 quoting *Aikens* at 714-715, 103 S.Ct., at 1481.

The Fourth Circuit apparently has interpreted this additional comment to require an additional element to the employment discrimination cause of action. In other words, a plaintiff must not only show facts which disprove a defendants proffered reason, but also must produce evidence of the employers true motive. Clearly, that is a much higher standard of proof.

The Court in *McDonnell Douglas vs. Green* held that a plaintiff could prove employment discrimination by direct evidence. But in its wisdom the Court realized that such "smoking guns" were relatively rare. Consequently, the *McDonnell Douglas* four-part test for proving discrimination in employment by circumstantial evidence was developed. In spite of the fact that *McDonnell Douglas* is still good law, the Fourth Circuit has aggressively and consistently chipped away at its framework for analyzing employment discrimination, in favor of the almost impossible higher standard of direct evidence. Upon review of the decisions in the Federal District Courts under the Fourth Circuit, employment discrimination cases are routinely summarily dismissed. This is so even in instances where the plaintiff has proven a prima facie case of discrimination and presented evidence of pretext. (App. B).

In the present case, all parties concede that for purposes of summary judgment, the petitioner has proven a prima facie case. He further produced evidence of pretext, coupled with a suspicion of mendacity, as to each and every reason articulated by the respondent for his rejection. Notwithstanding, the court rejected petitioners arguments, and dismissed his action for failure to show sufficient evidence to support a showing of pretext. (App. B).

Discrimination cases are inherently difficult to prove, particularly when most employers are cognizant of the laws, and can ostensibly justify any employment decision. After all they

remain in a position of power over the claiming party, having access and control over many witnesses and supporting documents upon which the claiming party would need to rely. They have no burden of proof other than to "articulate" a reason for its employment decisions. Without clarification on the issue of what type of evidence a plaintiff must produce at summary judgment, the Fourth Circuit's holdings indicate that almost any articulated reason by the defendant for its employment decision will preclude the case from reaching a jury.

CONCLUSION

This case presents a question of exceptional importance regarding the burden of proof and the role of the court in employment discrimination cases at the summary judgment stage. If the opinion below is allowed to stand, the plaintiff will have been denied a right to a jury trial, as well as the right to have a jury weigh the evidence, and its credibility. Likewise, by granting this petition for certiorari, this Court can correct the Fourth Circuit's decision which defies longstanding holdings that the Court can not resolve issues of dispute or weigh the credibility of the evidence.

Accordingly, Lemuel Cox respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 1, 1997

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-2824

LEMUEL H. COX,
Plaintiff - Appellant,

versus

GUILFORD COUNTY BOARD OF EDUCATION,
Defendant - Appellee,

and

JOHN WRIGHT, as an agent of Guilford County Schools,
Defendant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., Chief District Judge. (CA-95-678-2)

Argued: June 6, 1997 Decided: **July 1, 1997**

Before WILKINSON, Chief Judge, MICHAEL, Circuit Judge, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Angela Newell Gray, GRAY, NEWELL & JOHNSON, L.L.P., Greensboro, North Carolina, for Appellant. Patricia Ellen Dowds, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina, for Appellee. ***ON*** BRIEF: Jim D. Cooley, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina; Jill R. Wilson, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c) .

PER CURIAM:

In 1993, by mandate of the General Assembly of North Carolina, three public school systems -- the Guilford County Schools, the Greensboro City Schools, and the High Point City Schools -- were merged into one administrative unit, called the Guilford County Schools. The merger required a reduction in the administrative staff. At the time of the merger plaintiff-appellant Lemuel H.Cox, age fifty-eight, was curriculum specialist in health

and physical education for the Greensboro City Schools. He applied for that same administrative job in the newly merged system, but it was awarded (on the recommendation of a selection committee) to a thirty-one-year-old woman. Cox was reassigned to a position teaching physical education, and he resigned after about a year. Cox then sued the Guilford County Board of Education, alleging that he was rejected for the curriculum specialist's position in the merged system because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and that he was constructively discharged in violation of North Carolina General Statute § 143-422.2. The district court granted summary judgment to the Board on both claims, and Cox appeals. After reviewing the joint appendix and considering the briefs and arguments of counsel, we affirm on the thorough and well-reasoned opinion of the district court. See Cox v. Guilford County Bd. of Educ., No. 2:95CV678 (M.D.N.C. Dec. 10, 1996).

AFFIRMED

APPENDIX B – ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION FILED DECEMBER 10, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION

LEMUEL H. COX,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 2:95CV678**
	)	
GUILFORD COUNTY	)	
BOARD OF EDUCATION,	)	
Defendant.	)	

ORDER and JUDGMENT

BULLOCK, Chief Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Plaintiff's motion for summary judgment [#28] is DENIED. IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment [#25] is GRANTED and this action is DISMISSED with prejudice. IT IS

ORDERED that Defendant's motion to strike {#31] portions of Plaintiff's amended complaint is DISMISSED as moot.

_____

United States District Judge

December 10, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LEMUEL H. COX,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 2:95CV678**
	)	
GUILFORD COUNTY	)	
BOARD OF EDUCATION,	)	
Defendant.	)	

MEMORANDUM OPINION

BULLOCK, Chief Judge

This case arises from the not uncommon situation occurring when school systems merge and a number of loyal, well-qualified individuals seek a lesser number of upper level or administrative positions. Plaintiff, Lemuel H. Cox, filed this action against the Guilford County Board of Education ("Board") alleging that he was rejected for an administrative position on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S. C. § 621 et seq. ("ADEA") . Plaintiff also asserts that he was constructively discharged by the Board in violation of North Carolina General Statute § 143-422.2. This matter is before the court on cross-motions for summary judgment. In addition, Defendant has moved to strike portions of Plaintiff's amended complaint because Plaintiff allegedly made unauthorized changes in addition to adding the constructive discharge claims allowed by this

court. For the reasons set forth hereafter, the court will grant Defendant's summary judgment motion, making it unnecessary to consider the motion to strike.

FACTS

The following facts are established by the pleadings, affidavits, and exhibits offered by the parties. Where there are disputes, the position of each party is given.

On July 1, 1993, the Guilford County Schools, the Greensboro City Schools, and the High Point City Schools were consolidated into a single administrative unit, the Guilford County Schools. As a result, there were more employees who held central office positions in the three former systems than there were central office positions in the merged system. Because it was impossible to place all of the district employees in the positions they held prior to the merger, Defendant formed a committee to interview and recommend the most qualified employees for the administrative positions within the new system. This committee was made up of four administrators in the new system, each of whom was over forty years of age; Dr. Lillie M. Jones, Dr. Michael P. Renn, Dr. Sue Medley, and Mrs. Mary Martin. Each of the three former school systems was represented by at least one member of the committee.

At the time of the merger, Plaintiff worked in the central office of the Greensboro City Schools as the athletic director and the curriculum specialist in health and physical education. Cox, who was fifty-eight years old, had worked for the Greensboro school system in the area of health and physical education for thirty-two years. Although his job with the Greensboro system no longer existed after the merger, he was considered by the committee for two administrative positions in the newly merged system. First,

Plaintiff was interviewed and considered for, but did not receive, the position of director of athletics.[1] Second, he was considered for the position of curriculum specialist in health and physical education. The other candidate considered for this opening was Robin Bergeron, who was thirty-one years old at the time. Bergeron had been with the Greensboro school system for only eight years prior to the merger and had worked under the supervision of Plaintiff before taking the position of curriculum specialist in substance abuse and wellness in the Greensboro School System. Although it is undisputed that Cox was one of two candidates considered for this position, Plaintiff contends that he was never interviewed while Martin maintains that she conducted an interview of both candidates.

After the interviews for all of the administrative positions were completed, the committee members met to discuss the relative qualifications of the applicants. With regard to the curriculum specialist in health and physical education position, the Committee determined that Bergeron was the most qualified and recommended her for the job. The committee came to this conclusion because they felt that the main emphasis of the job would be on health education, an area in which Bergeron, unlike Cox, has a specific degree. The committee considered the health education aspects of the job to be the most important because of community concern about sex education and recent changes in the curriculum which have resulted in a focus on health education. For this reason, the undisputed fact that Cox has much more experience in the area of physical education was considered unimportant by the committee. Furthermore, Bergeron is certified as a health curriculum specialist while Cox has a more general certification as a health educator. Finally, the committee relied on observations of committee members who had worked personally with each of the candidates.

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[1] Cox does not claim that the committee's decision not to place him in the athletic director position was discriminatory.

After Plaintiff was not offered either of the positions for which he was considered, he was given his choice of three different teaching assignments. None of the available positions would have resulted in a reduction in pay or benefits for two years following the merger. Ultimately, he chose a position at Summerfield Elementary School teaching physical education. However, Cox taught there only until his resignation on February 28, 1994. Prior to his resignation, Cox filed a charge against the Guilford County School System with the Equal Employment Opportunity Commission ("EEOC") on October 27, 1993, alleging discrimination on the basis of age. The EEOC issued its determination that the ADEA was not violated and a right-to-sue notice on June 30, 1995, and Plaintiff timely filed this action.

DISCUSSION

Summary Judgment Standard

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on the relevant issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a jury might return a verdict in his favor." *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). When the motion is supported by affidavits, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. *Anderson*, 473 U.S. at 255. However, Plaintiff cannot survive summary judgment "through mere speculation or the building of one inference upon another". *O'Connor v. Consolidated Coin Caperers Corp.*, 56 F3d 542, 545 (4th Cir. 1995) (quoting

Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985), rev'd on other grounds, 116 S. Ct. 1307 (1996).

ADEA Demotion Claim

Under the ADEA, it is unlawful for an employer to discriminate against an employee "with respect to his compensation, perms, conditions, or privileges of employment because of such individual's age. 29 U.S.C. § 623 (a) (1) . To establish his claims under the ADEA, Plaintiff must prove that to 'but for the employer's motive to discriminate against [him] on the basis of age, the discriminatory action would not have occurred. *Henson v. Higgett Group, Inc*,, 61 F. 3d 270, 274 (0th Cir. 1995) (quoting *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992)). Stated another way, Plaintiff must illustrate that age was a "determinative factor" in Defendant's adverse employment decision. *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 326 (4th Cir. 1993). A plaintiff can establish a prima facie case of age discrimination in two ways. *Evans v. Technologies Applications & Serve. Co.*, 80 F.3d 954, 959 (4th Cirri. 1996). First, a plaintiff can meet his burden by ordinary standards of proof with direct and indirect evidence. *Burns v. AAF-McQuay, Inc*, 96 F.3d 728, 731 (4th Cir. 1996); Evans, 80 F.3d at 959. In this case, however, the record does not reveal any direct or indirect evidence of discriminatory motive. Thus, Plaintiff has not offered sufficient evidence to establish a prima facie case by this method and must resort to the second method of proof.

A plaintiff alternatively can establish a prima facie case through the burden-shifting method of proof developed in *McDonnell Douglas Corp. vs. Green*, 411 U.S. 792 (1973). See *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982) (adopting *McDonnell Douglas* scheme in ADEA cases). To establish a prima facie case under this scheme, Plaintiff must show

that: (1) he is a member of the protected class, at least forty years old; (2) he applied for the position; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. See *Carter v. Ball*, 33 F.3d 450, 058 (4th Cir. 1994).

If Plaintiff meets the low burden of establishing a prima facie case by a preponderance of the evidence, an inference of discrimination arises, and the burden of production shifts to Defendant to offer legitimate, non-discriminatory reasons for the allegedly discriminatory acts. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Evans*, 80 F.3d at 959-60. "The employer is not required to prove the absence of a discriminatory motive because the burden is one of production, not persuasion." *Henson*, 61 F.3d at 270-75 (citing *St. Mary's Honor Ctr. Vs. Hicks*, 509 U.S. 502, 511 (1993)). If a defendant meets its burden by articulating a legitimate and non-discriminatory reason for the adverse employment action, the *McDonnell Douglas* presumption disappears. *Evans*, 80 F.3d at 959. A plaintiff then bears the burden of persuasion to prove that the reason articulated by the employer was not truly the reason for the adverse action (a "pretext") and, ultimately, that the employer engaged in intentional discrimination. *Hicks*, 509 U.S. at 511; *Evans*, 80 F.3d at 959.

In the context of a summary judgment motion, however, a plaintiff is not required to meet both of these burdens. A plaintiff can survive summary judgment by raising a factual dispute regarding the employer's proffered reasons for the alleged discriminatory act. *Henson*, 61 B.3d at 274. However, by it pretext," a plaintiff must show more than that the defendant's reasons are mistaken or not well thought out. See *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995) (requiring plaintiff to show mendacity on the part of the defendant). Employers retain the right to make business decisions, even foolish ones, so long as they

do not violate the law. *Henson*, 61 F.3d at 277. Through all the complexities of the burden-shifting analysis, the court has one ultimate objective at the summary judgment stage: to determine whether there is any evidence of a stated purpose to discriminate on the basis of age of sufficient probative force to reflect at least a genuine issue of material fact. *Id.* at 275.

For purposes of the summary judgment motions in this case, Defendant concedes that Plaintiff can establish a prima facie case of age discrimination. Consequently, the court will move to the second stage of the analysis and consider whether Defendant has met its burden of producing legitimate and non-discriminatory reasons for the adverse employment actions. Here, Defendant has offered legitimate, non-discriminatory reasons for its decision to place Bergeron, not Cox, in the position of curriculum specialist in health and physical education in the newly merged system.

The committee charged with recommending the most qualified candidate for the job determined that the health education aspects of the job were much more important than the physical education aspects. The committee placed a great deal of emphasis on health education when making its decision because of community concern about sex education and a changing curriculum in which health and fitness have become the primary focus. Because of this focus, the committee members unanimously agreed that Bergeron was more qualified for the position based on their first-hand observations as well as her educational background and experience. Specifically, Bergeron has an undergraduate degree in school health education, course work in nursing, and a master's degree in education administration and supervision. Furthermore, her experience as a curriculum specialist for substance abuse and wellness is in the area of health education. In addition, the State requires that the curriculum specialist position be filled by an employee certified as a "health specialist" in order for the school

system to receive state funding for the position. Bergeron, unlike Cox, is certified by North Carolina as a "health specialist" based on her undergraduate degree in health education.

Ultimately, the committee concluded that Bergeron possessed the stronger and more current knowledge of health issues necessary for the position. "Job performance and relative employee qualifications are widely recognize as valid, non-discriminatory bases for any adverse employment decision." *Evans*, 80 F.3d at 960. Because these reasons are sufficient to meet the Defendant's burden of production, the presumption of discrimination disappears from the case. Thus, to avoid summary judgment, Cox must offer evidence that raises a question of material fact concerning whether age was more likely the reason for the adverse action or whether the proffered explanation is simply unworthy of credence. *Burns*, 96 F.3d at 731. In this case, Cox is unable to meet this burden.

Cox contends that the committee's focus on the health education aspects of the position was pretextual in light of the dual responsibilities for health and physical education outlined in the job's description. However, "[t]he decision as to what criteria shall be considered in making employment decisions lies fully in the hands of the employer, as long as discriminatory criteria are not applied. *Bostic v. Wall*, 588 F. Supp. 994, 1002 (W.D.N.C. 1984), affhd, 762 F.2d 993 (4th Cir. 1985). Because Plaintiff has not produced evidence that discriminatory criteria were used by the decisionmakers, the committee's focus on education and experience in the area of health education, as opposed to physical education, is well within its discretion.

Cox next asserts that the committee's conclusion that Bergeron was more qualified for the position was a pretext for discrimination against him on the basis of age in light of his prior experience. It is well settled, however, that "'the employer has

discretion to chose among equally qualified candidates provided the decision is not based upon unlawful criteria." *Evans*, 80 F.3d at 960 (quoting *Wileman vs. Frank*, 979 F.2d 30, 38 (4th Cir. 1992)). Thus, where the non-discriminatory reasons proffered by the employer concern the relative qualifications of the candidates, and the plaintiff cannot point to any evidence of discrimination, "the plaintiff must establish that [he] was the better qualified candidate for the position sought. *Id.* (citing *Gairola v. Commonwealth of Virginia Dep't of Gen. Serv.*, 753 F.2d 1281, 1287 (4th Cir. 1985)); *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985). By establishing that he was more qualified for the position, Cox could raise an inference of discrimination sufficient to survive the summary judgment motion.

To support his claim that he was more qualified, Cox points to his thirty-two years of experience in physical education, his certification as a health educator, and his performance as the curriculum specialist in health and physical education in the Greensboro system prior to the merger. Furthermore, Cox emphasizes his experience dealing with parents, making curriculum choices, and coordinating physical education programs. Because these are aspects of the curriculum specialist position, it is undisputed that Cox was qualified for the position. Nonetheless, the committee members believed that Cox's primary focus was on athletics and physical education, not on health education. In light of the importance of health education to the committee, the evidence offered by Cox to establish that he was more qualified for the position is insufficient to raise an inference of unlawful discrimination.

Cox contends that Bergeron was not as qualified in either health or physical education because she lacked both sufficient experience and a broad-based knowledge of the health curriculum.

However, Plaintiff's unsubstantiated opinion concerning his qualifications for the job and the faults of Bergeron do not have sufficient probative force to create a genuine issue of material fact. *Lovelace*, 681 F2d at 245; *Smith v. Flax*, 618 F.2d 1062, 1027 (4th Cir. 1980). Although it is undisputed that Cox has more years of experience in the school system than Bergeron, this fact does not automatically make him more qualified. *SeeYoung*, 748 F.2d at 198. Thus, while Cox believes that his thirty-two years of service made him more qualified, " [i] t is the perception of the decisionmaker which is relevant, " not the plaintiff's perception of himself. *Evans*, 80 F.3d at 960-61 (quoting *Smith*, 618 F.2d at 1067)).

The committee determined that Bergeron possessed a stronger and more current knowledge of health education based on her undergraduate degree, her certification as a health specialist, and her experience as the curriculum specialist for substance abuse and wellness. The committee believed that this knowledge made Bergeron better suited to make informed curriculum decisions in light of the fact that the focus is now on health and fitness instead of physical education. In addition, the committee believed that her experience dealing with parents, while not as extensive as Cox's, would be sufficient for the position with the new system. Also, Bergeron, unlike Cox, had experience in the controversial area of sex education with her student teaching and her involvement in a "Teens Taking Charge" program. Finally, the committee felt that Bergeron was better qualified because she, unlike Cox, met the specific requirement for state funding of the position in question--certification as a health specialist.[2] Consequently, the committee

[2] Although it is undisputed that Cox was not certified as a health specialist, he contends that he was nonetheless qualified for the position because he had received a waiver of the requirement in 1981 that had not been revoked. The committee agreed that Cox was qualified for the position even -with this deficiency, but felt that the fact that Bergeron specifically met the requirement made her the more qualified candidate.

concluded that Bergeron was more qualified even though she had less experience in the area of physical education than Cox.

Even if the committee members mistakenly focused on the health education aspect of the position, mistakes alone do not violate the law. *Henson,* 61 F.3d at 277. This court has previously noted that "[in examining discrimination cases, the court must be careful not to substitute, nor allow the jury to substitute, its judgment for the decisionmaker's in business decisions which do not have age or other protected characteristics as a determining f actor." *Wray v. Northern Telecom, Inc.*, No. 1:93CV00120, slip op. at 9 (M.D.N.C. Jan. 27, 1995). While Cox was arguably better qualified in terms of physical education and had more experience dealing with parents and making curriculum decisions, these are factors the committee did not consider to be as important for the position. Thus, the relative abilities of the candidates in these areas should not be considered for purposes of establishing pretext. Because the committee's focus on health education did not involve an impermissible factor such as age, the court should refrain from substituting its judgment for the legitimate decision of the committee. Thus, without more, Cox's evidence of his qualifications is insufficient to create a dispute of material fact concerning whether the Defendant's proffered reasons were pretextual.

In addition to Cox's failure to establish that he was more qualified for the position, he is also unable to point to any evidence from which an inference can be drawn that age was the true reason for the adverse action. Cox asserts that a genuine issue of material fact exists concerning whether he was interviewed by Martin for the curriculum specialist position. Cox claims, contrary to what Martin stated during her deposition, that he was not interviewed for the position by Martin. Even taking Cox's version of events as true, as the court must, this dispute does not create an inference that the

committee members were motivated by age animus. It is undisputed that Cox had been interviewed by Renn for the athletic director position and that he was one of the two people considered for the curriculum specialist position. Thus, his experience and qualifications were known by the committee members at the time he was considered for the job even if Martin mistakenly failed to interview him specifically for the curriculum specialist position.[3] It is also undisputed that recommendations were made by the committee as a whole, not by the individual interviewer, after discussing as a group each applicant's experience, education, and certification. Further, the group relied on the assessment of committee members who had worked with the applicants in the former school systems. Because Cox was one of the two applicants considered for the position and the committee was aware of his credentials at the time it unanimously recommended Bergeron for the job, the dispute over whether he was interviewed by Martin for the job is insufficient to raise an inference of discrimination on the basis of age.

This conclusion is bolstered by statistical evidence offered by Defendant which compares the age composition of the qualified applicant pool for central office positions in the new system with the age composition of the central office staff ultimately hired. These statistics illustrate that while 89.19% of the applicant pool of certified administrators were over forty, 89.29% of the central office positions in the new system were filled by employees over forty. Thus, it cannot be inferred that the committee members, all

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[3]Martin stated in her deposition that committee members did not interview the candidates for specific positions unless they had applied at the director's level. Instead, she claimed that the applicants were simply contacted by committee members and asked generally about their interests, experience, and education. Thus, this general information would have been known by the committee as a result of Cox's interview with Renn for the athletic director position.

of whom were over forty themselves, weighted their decisions against the older applicants.

Taken cumulatively, the evidence offered by Cox is insufficient to establish either that "as between the Plaintiff's age and the Defendant's explanation, age was the more likely reason for the dismissal, or that the employer's proffered explanation is simply unworthy of credence. Burns, 96 F.3d at 731 (internal quotation marks omitted). Consequently, the court will grant Defendant's summary judgment motion on Plaintiff's cause of action under the ADEA.

State Law Constructive Discharge Claim

Defendant has also moved for summary judgment on Plaintiff's claim that Defendant discriminated against him on the basis of his age in violation of the public policy of North Carolina as stated in North Carolina General Statute § 143-422.2. Section 143-422.2 provides that "[i]t is the public policy of the state to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religion, color, national origin, age, sex or handicap by employers." Because it is undisputed that Plaintiff voluntarily resigned from his position, he attempts to prove that Defendant constructively discharged him by assigning him to a position teaching physical education in an elementary school after more than thirty years as an administrator.

"A constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (internal quotation marks omitted). Thus, to establish a claim of constructive discharge, Plaintiff must prove

claim of constructive discharge, Plaintiff must prove two elements: (1) deliberateness of the employer's action, and (2) intolerability of the working conditions. The first element can be established only with proof of the employer's specific intent to force an employee to leave. Id. While intent may be inferred through circumstantial evidence, such as Defendant's failure to correct known intolerable conditions, difficult working conditions are insufficient to establish intent where all employees are treated identically. Id. (citing *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)). The second element, intolerability of working conditions, is assessed by the objective standard of whether a "reasonable person" would have felt that he had no choice but to resign under the circumstances presented to Plaintiff. *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996). "Thus, the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge. *Bristow*, 770 F.2d at 1255.

Construing the evidence in the light most favorable to Plaintiff, it is evident that the Plaintiff has failed to satisfy the constructive discharge test in this case. During his deposition, Cox stated that he enjoyed his job at Summerfield and was able to perform his duties well enough to receive good performance evaluations. He also admitted that he was never treated unfairly at the elementary school because of his age. Furthermore, his resignation letter did not indicate that he resigned as a result of intolerable conditions. Rather, in the letter Cox indicated that he resigned because of health problems and expressed his enjoyment of his years in education and his best wishes to the new school system.

Although Cox does not contend that the conditions at Summerfield Elementary were intolerable, he does assert that assigning an administrator with over thirty years of experience to a physical education teaching position at an elementary school was

intolerable. However, the fact that Cox may have felt humiliated by his transfer to a teaching position with less responsibility does not establish a constructive discharge. See *Peterson v. Lanier Worldwide, Inc.*, No. 95-1222, 1996 WL 452642 at 2 (4th Cir. Aug. 12, 1996) (finding no constructive discharge even though reclassification resulted in loss of pay and responsibility); *Pena v. Brattleboro Retreat,* 702 F.2d 322, 325 (2d Cir. 1983) (holding that a change in responsibilities which did not result in a loss of pay did not constitute constructive discharge); *EEOC v. Community Unit Sch, Dist, No. 9,* 642 F. Supp. 902, 906 (S.D. Ill. 1986) (finding no constructive discharge even though former administrator felt humiliated after being reassigned to the classroom). Thus, in light of the fact that Plaintiff did not suffer any reduction in pay or benefits as a result of the teaching assignment,[4] Cox must point to other evidence to establish that a reasonable person would have felt compelled to resign under the circumstances that confronted Cox.

However, Cox is unable to produce any such evidence. Cox contends that he is aware of three former administrators with over thirty years of experience who resigned rather than teach after the merger. He is unable to recall, however, any of their names or to provide any further evidence concerning the circumstances surrounding their decisions to resign. Without more, this evidence is insufficient to meet the requirement that the conditions be intolerable to a reasonable person.

Cox also fails to establish that Defendant intended to force the Plaintiff's resignation by assigning him to a teaching position. After the merger, the new system was presented the task of reassigning many employees who had held central office positions

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[4] Although it is true that the same pay and benefits were guaranteed only for two years after the merger, this fact does not change the analysis, and Plaintiff still fails to establish constructive discharge.

within the three former systems because fewer central office positions were available. The committee charged with making the employment decisions attempted to fill the positions with the applicants who were most qualified. Considering that Plaintiff was one of eighteen former administrative employees reassigned to the classroom because of necessity after the merger, it cannot be said that the committee reassigned Cox with the intent to force his resignation. Further, the mere fact that Cox, a fifty-eight-year-old man at the time of the merger, had to exert himself while teaching his physical education class does not establish improper motive by the Defendant. Cox was assigned to teach physical education with no reduction in pay or benefits because physical education was his area of expertise, not because of an intent by Defendant to force his resignation.

In addition, personnel records offered by Defendant illustrate that the committee members did not engage in a scheme to force out all administrators with over thirty years of experience. The records indicate that of the ten employees with over thirty years of experience who applied for central office positions in the new system, eight received administrative jobs while only two were reassigned to the classroom. Therefore, Cox cannot establish that his reassignment to the classroom was improperly motivated as a result of his age.

Although it is unfortunate that a central office position was not available for Cox after his many years of service, the magnitude of the merger made it inevitable that many would not be satisfied with the final decision of the committee. In short, the Defendant's reassignment of Cox to the classroom constitutes nothing more than a tough, but legitimate business decision. Consequently, Plaintiff fails to state a claim of wrongful discharge under North Carolina law because he voluntarily resigned and is unable to establish that he was constructively discharged.

CONCLUSION

For the reasons set forth above, the court will grant Defendant's summary judgment motion on Plaintiff's discrimination claim under the ADEA as well as on Plaintiff's wrongful discharge claim under state law. Plaintiff's motion for summary judgment will be denied. Because the court will dismiss the Plaintiff's action, Defendant's motion to strike portions of Plaintiff's amended complaint will be dismissed as moot.

December 10, 1996

United States District Judge

APPENDIX C- TITLE 29 U.S.C. § 623

CHAPTER 14 – AGE DISCRIMINATION IN EMPLOYMENT

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

APPENDIX D- NORTH CAROLINA GENERAL STATUTE

Article 49A.

Equal Employment Practices.

§ 143-422.2. Legislative declaration.

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general. (1977, c. 726, s. 1.)

APPENDIX E- Federal Rules of Civil Procedure Rule 56(c)

Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.

APPENDIX F – NORTH CAROLINA GENERAL STATUTE

Article 8.

General Education.

Part 1. Course of Study.

§ 115C-81. Basic Education Program.

(e) School Health Education Program to Be Developed and Administered.

(4) Each existing local school administrative unit is eligible to develop and submit a plan for a comprehensive school health education program which shall meet all standards established by the State Board of Education, and to apply for funds to execute such plans.

The State Board of Education shall designate an impartial panel to review health education programs plans submitted by local school administrative units. Based on the panel's evaluation of the plans, the State Board of Education shall allocate the State-funded school health coordinators. Where feasible, a school health coordinator shall serve more than one local school administrative unit.

Each person initially employed as a State-funded school health coordinator after June 30, 1987, shall have a degree in health education.

APPENDIX G - GUILFORD COUNTY SCHOOL SYSTEM JOB DESCRIPTION

JOB TITLE: CURRICULUM SPECIALIST HEALTH AND PHYSICAL EDUCATION EDUCATIONAL PROGRAM SERVICES DEPARTMENT

GENERAL STATEMANT OF JOB

Under general supervision, performs a variety of administrative tasks in coordinating the successful implementation of health and physical education programs in the County school system. Employee is responsible for interpreting changes to the North Carolina Curriculum regarding health and physical education, informing teachers and principals of the implications of those changes, and ensuring that instruction is aligned with curriculum goals. Employee conducts observations of existing health and physical education programs, evaluates the effectiveness of current programs and also assess the need for new programs. Employee provides professional development opportunities for staff and assists teachers in developing goals for individual programs. Employee also assists teachers with textbook and other materials selection and provides teachers various tools and materials to aid instruction. Reports to director of Curriculum Specialists.

SPECIFIC DUTIES AND RESPONSIBILITIES

ESSENTIAL JOB FUNCTIONS

Coordinates the health and physical education Program for the school system; visits schools and observes classes on a regular basis to evaluate current programs and assess the need for new programs Meets with principals and teachers to discuss the implementation of curriculum goals; schedules specialists as required.

Ensures teachers and principals are familiar with any changes to the North Carolina Curriculum regarding health and physical education; provides leadership in curriculum planning and the formation of goals and objectives for the program.

Provides guidance to school and community personnel in special program areas such as AIDS education, Cardio Pulmonary Resuscitation and First Aid.

CURRICULUM SPECIALIST - HEALTH AND PHYSICAL EDUCATION

Assists with the overall evaluation of health and physical education programs in the system and develops strategies for improvement; coordinates and provides staff development opportunities

Assists the school system with the acquisition of appropriate textbooks, teacher guides and other instructions materials and equipment for health and physical education; works with principals and teachers to acquire additional space and facilities at individual schools for health and physical education use.

Convenes periodic meetings of contact teachers and department chairpersons in the area of health and physical education and attends department and general staff meetings as required.

Assists in developing guidelines and recommendations for Health and Physical Education programs for the State Department of Public Instruction.

Keeps parents, administrators and community citizens informed about health and physical education programs in the school system.

Assists Director with developing the annual budget for health and physical education programs and events.

Serves on ICF and other teacher performance appraisal teams as requested by principals.

Participates in various professional and community organizations; attends various workshops, seminars and conferences to continuously update professional knowledge.

Develops comprehensive five year plan for the district in Health and Physical Education.

ADDITIONAL JOB FUNCTIONS

Assists Personnel Department with screening and interviewing applicants for teaching positions.

Coordinates district intramural program.

Works with local colleges and universities regarding Health and Physical Education teacher education program.

CURRICULUM SPECIALIST - HEALTH AND PHYSICAL EDUCATION

Performs other related work as required.

MINIMUM TRAINING AND EXPERIENCE

Master's degree in Health, Physical Education, or a related field, and 5 to 7 years of experience teaching and administrating programs; or any equivalent combination of training and experience which provides the required knowledge, skills and abilities.

SPECIAL REQUIREMENTS

Most hold a current North Carolina Curriculum Specialist Certification. Must be certified in health education in the State of North Carolina. Must possess a valid North Carolina Drivers license.

MINIMUM QUALIFICATIONS OR STANDARDS REQUIRED TO PERFORM ESSENTIAL JOB FUNCNONS

Physical Requirements: Must be physically able to operate a variety of equipment including computer copiers, etc. Must be physically able to operate a motor vehicle. Must be able to exert up to 10 pounds of force occasionally, and/or a negligible amount of force constantly to lift, carry, push, pull or otherwise move objects, including the human body. Light Work usually requires walking or standing to a significant degree.

Data Conception: Requires the ability to compare and/or judge the readily observable, functional, structural or composite characteristics (whether Similar or divergent from obvious standards) of data, people or things.

Interpersonal communication: Requires the ability to speak and/or signal people to convey or exchange information. Includes giving instructions, assignments or directions to subordinates or assistants.

Language Ability: Requires the ability to read a variety of correspondence, reports, forms, evaluations, budgets, etc. Requires the ability to prepare correspondence, reports, presentations, schedules, forms, evaluations, budget etc., using prescribed formats and conforming to all rules of punctuation, grammar, diction, and style. Requires the ability to speak before groups of people with poise, voice control and confidence.

CURRICULUM SPECIALIST - HEALTH AND PHYSICAL EDUCATION

Intelligence: Requires the ability to apply principles of logical or scientific thinking to define problems, collect data, establish fact, and draw valid conclusions; to interpret an expansive variety of technical instructions in mathematical or diagrammatic form; and to deal with several abstract and concrete variables.

Verbal Aptitude: Requires the ability to record and deliver information, to explain procedures, to follow oral and written instructions. Must be able to communicate effectively and efficiently in Standard English.

Numerical Aptitude: Requires the ability to utilize mathematical formulas-, to add and subtract; multiply and divide; and to utilize decimals and percentages.

Form/Spatial Aptitude: Requires the ability to inspect items for proper length, width and shape.

Motor Coordination: Requires the ability to coordinate bands and eyes rapidly and accurately in using office equipment.

Manual Dexterity: Requires the ability to handle a variety of items such as office equipment. Must have minimal levels of eye/hand/foot coordination.

Color Discrimination: Does not require the ability to differentiate between colors and shades of color.

Interpersonal Temperament: Requires the ability to deal with people beyond giving and removing instructions. Must be adaptable to performing under stress and when confronted with emergency situations.

Physical Communication.: Requires the ability to talk and hear: (Talking: expressing or exchanging ideas by means of spoken words. Hearing: perceiving nature of sounds by ear.) Must be able to communicate via telephone.

KNOWLEDGE, SKILLS AND ABILITIES

Thorough knowledge of the North Carolina State Curriculum as it applies to health and physical education.

Considerable knowledge of health and physical fitness information appropriate for school-age children.

CURRICULUM SPECULIST - HEALTH AND PIIYSICAL EDUCATION

Considerable knowledge of the current literature, trends, and developments in the field of health and physical education.

Considerable knowledge of the principles of supervision, organization and

General knowledge of the County and School Board policies, procedures and Standards regarding primary education.

General knowledge of the organization and communication channels of the school system.

General knowledge of the ethical guidelines applicable to the position as outlined by professional organizations and/or federal, state and local laws, rules and regulations.

Skill in counseling, developing and supporting staff.

Ability to evaluate the effectiveness of health and physical education programs and to make recommendations for improvements.

Ability to select appropriate and effective textbooks and other material. Ability to use common office machines and popular computer-drive word processing, spreadsheet and file maintenance programs.

Ability to maintain complete and accurate records and to develop meaningful reports for them.

Ability to develop meaningful annual budgets.

Ability to effectively express ideas orally and in writing.

Ability to make effective oral presentations before large groups of people.

Ability to exercise considerable tact and courtesy in frequent contact with the public.

Ability to establish and maintain effective working relationships as necessitated by work assignments.

© DMG, 1994

APPENDIX H- LETTER FROM MARY MARTIN DATED OCTOBER 20, 1994

Elementary
712 North Eugene Street
Greensboro, NC 27402-0880

Phone: 910-330-2312
Fax: 910-330-8299

Jerry D. Weast, Ed.D., Superintendent

Mary Martin, Executive Director, Elementary Education

I am a resident of Guilford County, North Carolina, born May 30, 1949, and currently serve as Executive Director of Elementary Education. Prior to the consolidation of our three school systems, in July, 1993, I was Associate Superintendent in the former county system. I have been asked to recall as much as possible about the process we went through to assign individuals to positions in the newly consolidated school system. To the best of my knowledge, the statements below reflect the situation and process which occurred during April and May of 1993.

1. Dr. Jerry Weast was named superintendent of the Guilford County Schools in April, 1993. He met with senior staff from the three former systems in order to select his three Associate Superintendents and then direct them to organize their areas and place individuals in the positions available.

2. Dr. Lillie Jones, of the former High Point System, was named Associate Superintendent for Educational Program Services and designated a committee dedicated to recommend persons to fill positions in the newly merged system. She named as her three

Executive Directors: Dr. Mike Renn and Dr. Sue Medley from the City of Greensboro and me from the Guilford County system.

3. This team was charged with completing the rest of the organizational chart the Educational Program Services Division. The chart was publicized and individuals currently working in any of the three systems were given the opportunity to express interest in one or more of the director positions.

4. The Committee conducted interviews with anyone who had expressed interest in the director positions. In making its personnel decision, the Committee sought to identify the best candidate for the job, considering the best qualified current employee while insuring diversity by race and sex. In addition, the Committee was especially cognizant of the need to achieve in the ultimate selections a geographic balance relative to the three districts.

5. These positions were not publicly advertised. The newly merged system had considerably more employees to place than positions available. In many cases there were three individuals competing for one position.

6. The Committee determined its choices for directors and then proposed what the rest of the chart (below directors) should look like. This took several meetings with Dr. Jones getting reactions from the superintendent in between. We were simultaneously working on the budget and the final version had far fewer positions than originally hoped for because of the need to cut costs.

7. Each Committee member initiated a meeting with individuals currently working in positions related to their division. For example, I contacted individuals who had worked as curriculum specialists and met with them individually. I asked them what

positions they were most interested in and what other positions they might want. We discussed experience, certification, etc.

8. As I recall my conversation with Lem Cox, he was most interested in the area of athletics. He had been the physical education specialist and athletic director for the City of Greensboro system.

9. While I was not part of the interview for the Position of Director of Athletics and Student Activities, I do recall some of the discussions at the time. Mike Renn interviewed Lem Cox, Herb Goons and Bill Cutts for the Director position. All three were viewed as capable but there was only one position. Bill Cutts was selected, a principal reason being that he was from the former county system. The age of the candidates played no role whatsoever in the decision.

10. Herb Goins was placed in a position in the Personnel Office and Lem Cox was placed in a position as a physical education teacher. The salaries of both were maintained.

11. I also participated in the Committee's decision regarding the selection of a new Curriculum Specialist for Health Education. As I recall, I approached Lem Cox about applying for the position; he had not applied on his own initiative. The Committee ultimately had before it two candidates for the position, Mr. Cox and Robin Bergeron. Robin Bergeron was the former substance abuse/health specialist for Greensboro. She is certified in the area of health education and has experience as a health educator.

12. A major issue in the community during this period and continuing today is health education, specifically sex education. At virtually every meeting of the Board of Education, there are speakers on the subject. During the Spring prior to consolidation, the Interim Board held a public hearing on the topic with about 300

people attending. We felt that the individual selected for the Curriculum Specialist position needed to be especially knowledgeable in the area of health education because of the level of concern in our community.

13. Robin Bergeron is certified in Health Education. Lem Cox is not. This was the principal reason for her selection.

14. I relied heavily on the professional opinions of my colleagues who had worked with individuals being considered for positions. For example, Mike Renn and Sue Medley both gave input on who would be the best person for the position of Curriculum Specialist for Health Education. Both had worked with Robin Bergeron and Lem Cox in the Greensboro district. In fact, Mike Renn had supervised the area they both worked in. Both agreed that Robin Bergeron was best suited for the position due to her certification and experience in the area of

15. Age played no role whatsoever in either of the Committee's decisions regarding Lem Cox by the district. In fact, I was not aware of Mr. Cox's age until I learned of his charge that he was discriminated against allegedly due to his age.

_____

Mary Martin

October 20, 1994

APPENDIX I – LETTER FROM MARY MARTIN UNDATED

Elementary Education
712 North Eugene Street
Greensboro, NC 23402-0860

Phone: 910-370-2312
Fax: 910-370-8299

Jerry D. Weast, Ed.D., Superintendent

TO WHOM IT MAY CONCERN:

The difference in certification of Lem Cox and Robin Bergeron was a factor in selecting Robin Bergeron as our Health Education Specialist.

Lem Cox is certified as a Health Educator. Robin Bergeron is certified as a Health Education Specialist.

Mary Martin

Children First

APPENDIX J – LETTER FROM J. ARTHUR TAYLOR DATED JULY 17, 1981

DEPARTMENT OF PUBLIC INSTRUCTIONS

STATE OF NORTH CAROLINA RALEIGH

July 17, 1981

Dr. Kenneth R. Newbold, Superintendent
Greensboro City Schools
P.O. Drawer V
Greensboro, NC

Dear Dr. Newbold:

Re: Lemuel Howard Cox
S.S. #242-52-

We have reviewed the certification record for Mr. Cox. In 1975, he completed a program of preparation at East Carolina University in Health and Physical Education. He qualified for the certificate in Health and Physical Education. This was the certification for Health Education prior to action by the State Board of Education in 1972 which separated Health and Physical Education into separate certification areas. In 1960, Mr. Cox completed the master's degree at George Peabody College and qualified for certification as a supervisor. His current certification is valid through June 30, 1985.

You have requested me to speak to the qualifications of Mr. Cox for a position as Health Education Coordinator with the Greensboro Public Schools. The "Agreement" for such a position specifies among other things that the School Health Education Coordinator shall meet four requirements to qualify for

employment. Mr. Cox clearly meets items #1, #3 and #4. He does not technically meet item #2 which specifies an undergraduate or graduate degree in Health Education. He does hold certification in Health Education but he does not hold a specific undergraduate or graduate degree in Health Education He does meet the requirements for health certification which were in effect at the time he completed his college program; therefore, it is my opinion the he meets the spirit of the qualifications written into the "Agreement" and that any questions raised relative to his qualifications to fill the School Health Education Coordinator position are based on a technicality. Since Mr. Cox does not hold a formal degree in Health Education and item #2 provides that if a person does not hold a degree in health education a waiver may be granted by the Division of Health, Safety and Physical Education, I recommend that you request a waiver by that division which will clear this technicality.

If we may supply additional information or assist further, please contact us.

Sincerely,

J. Arthur Taylor, Director
Division of Standards and Certification

JAT/js
cc: Al Proctor
Jerome Melton
Bill Peek

APPENDIX K – LETTER FROM KENNETH NEWBOLD DATED JULY 20, 1981

GREENSBORO PUBLIC SCHOOLS
DRAWER V
Greensboro, N.C. 27402

Office of the Superintendent **July 20,** 1981

Dr. Al Proctor, Director
Division of Health, Safety & Physical Education
State Department of Public Instruction
Raleigh, North Carolina 27611

Dear Dr. Proctor:

This letter is a follow-up of a letter dated July 17, 1981, that I received from Mr. J. Arthur Taylor pertaining to Lemuel Howard Cox, who is being assigned to the position of Health Educator. Greensboro will no longer have a Director (Supervisor, Consultant) in Physical Education, Driver Education and Safety. Mr. Cox will be a full-time Health Educator. Other members of our staff will assume responsibility in driver education. The four athletic directors in the senior high schools will coordinate athletics.

I would like to request a waiver of requirement No. 2, that Mr. Cox does not technically meet. However, I feel that his education and experience are more than adequate for him to meet this requirement and to perform the duties of health educator for the Greensboro Public Schools. He is an outstanding professional and

we have been fortunate to have him for almost twenty (20) years in this school system.

Sincerely Yours,

Kenneth R. Newbold
Superintendent

KRN: RC
Copy to: Mr. Lem Cox
Assistant Superintendents
Mr. Jerome Melton
Mr. Bill Peek
Mr. J. Arthur Taylor

APPENDIX L – LETTER FROM AL PROCTOR DATED JULY 31, 1981

DEPARTMENT OF PUBLIC INSTRUCTION

STATE OF NORTH CAROLINA RALEIGH

July 31, 1981

Dr. Kenneth R. Newbold
Superintendent
Greensboro City Schools
712 North Eugene Street
Greensboro, NC 27402

Dear Dr. Newbold:

The purpose of this letter is to inform you that the request of waiver for Lem Cox to serve as Health Education Coordinator for the Greensboro Public Schools is approved. I am sure Mr. Cox will serve the health education teachers and students of the Greensboro Public Schools quite well.

If we can be of assistance to you, please let us know.

With best regards,

Al Proctor, Director
Division of Health, Safety,
and Physical Education

AP/dma

(2)

Supreme Court, U.S.
FILED
DEC 2 1997
CLERK

No. 97-584

In The

Supreme Court of the United States

October Term, 1997

LEMUEL H. COX,

Petitioner,

vs.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JILL R. WILSON
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Attorneys for Respondent

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888

QUESTIONS PRESENTED

Whether the decisions of the lower courts conflict with *St. Mary's Honor Center v. Hicks*.

Whether the District Court properly held that Petitioner failed to present evidence of pretext to survive summary judgment.

STATEMENT OF THE CASE[1]

The Respondent Guilford County Board of Education (hereafter "Respondent") disagrees with several factual allegations set forth by Petitioner Lemuel Cox (hereafter "Petitioner") in his statement of the case and argument. Instead of including a lengthy recitation of the facts in its brief, Respondent refers the Court to the statement of facts contained in the District Court's Memorandum Opinion. (Petitioner's Appendix, p. 4a, *et seq.*)

Petitioner filed this action in the United States District Court for the Middle District of North Carolina on September 21, 1995, against the Guilford County Board of Education and Associate Superintendent John Wright, alleging violation of the Age Discrimination in Employment Act ("ADEA") and wrongful discharge in violation of North Carolina General Statute § 143-422.2.[2] On June 20, 1996, the court dismissed with prejudice all claims against John Wright. Petitioner did not appeal from that order. The parties filed cross motions for summary judgment on July 10, 1996. On December 10, 1996, the District Court granted Respondent's motion for summary judgment and denied Petitioner's motion for summary judgment. Petitioner appealed that decision to the United States Court of Appeals for the Fourth Circuit. The case was argued before the Fourth Circuit on June 6, 1997. The Fourth Circuit affirmed the District Court's decision by an unpublished per curiam opinion filed July 1, 1997.

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1. The Respondent is satisfied with the Petitioners' citations of reports of the opinions entered by courts below, jurisdictional statement and list of statutory provisions. The Respondent has elected pursuant to Supreme Court Rule 24.2 not to include these items in its brief.

2. Petitioner's claim under N.C. Gen. Stat. § 143-422.2 is subject to the same analysis as an ADEA wrongful discharge claim. *Robinson v. Ladd Furniture, Inc.*, 872 F. Supp. 248, 253 (M.D.N.C. 1994).

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT DECISIONS DO NOT CONFLICT WITH *ST. MARY'S HONOR CENTER v. HICKS*.

Petitioner contends that the Fourth Circuit Court of Appeals has misinterpreted this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), by requiring a plaintiff not only to disprove the legitimate non-discriminatory reason offered by the employer, but also to prove that discrimination was the real reason for the employer's decision. As the Court is fully aware, this is precisely what *Hicks* does hold, and *Hicks* does not depart from the firmly established case law regarding the proof scheme for employment discrimination cases, as set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). It is Petitioner who has misinterpreted the holding in *Hicks*. Petitioner argues that *Hicks* and *Burdine* stand for the position that a plaintiff satisfies his burden of proof by merely producing evidence that the employer's proffered reason was false. In support, Petitioner selectively quotes *Hicks* out of context. On page 8 of his Petition for Certiorari, Petitioner quotes *Hicks*, 113 S. Ct. at 2752, "we must agree with the dissent on this one: The words [of *Burdine*] bear no other meaning but that the falsity of the employer's explanation is alone enough to compel judgment for the plaintiff." Petitioner contends that this passage shows that a plaintiff need not prove that discrimination was the real reason behind an employer's decision. What Petitioner fails to note is that *Hicks* goes on to state that the quoted passage of *Burdine* is problematic since it contradicts the very holding in *Burdine*, as well as other case law, including *McDonnell Douglas*. *Hicks*, 509 U.S. at 517, 113 S. Ct. at 2752-2753.

The true holding of *Hicks* is clear. "The ultimate burden of

persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Hicks*, 509 U.S. at 507, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093). Once the defendant produces evidence of a legitimate, non-discriminatory reason for its decision, "the presumption raised by the prima facie case is rebutted, and drops from the case." *Id.* Plaintiff then must show "that the proffered reason was not the true reason for the employment decision and that race was." *Id.* "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* 509 U.S. at 519, 113 S. Ct. at 2754 (emphasis original). When deciding this case, the Fourth Circuit and District Court correctly applied *Hicks* by requiring Petitioner to show both that Respondent's reason for not hiring him was false and that his age was the real reason behind the decision. The courts did not require Petitioner to satisfy any higher burden of proof than the case law requires.[3]

II. THE DISTRICT COURT PROPERLY HELD THAT PETITIONER FAILED TO PRESENT EVIDENCE OF PRETEXT TO SURVIVE SUMMARY JUDGMENT.

It is undisputed that Respondent set forth a legitimate, non-discriminatory reason for its employment decision: the hiring committee believed that the selected candidate (Ms. Bergeron) was more qualified for the position than Petitioner. The District Court properly applied Fourth Circuit precedent and held that "where the non-discriminatory reasons proffered by the employer concern the relative qualifications of the candidates, and the plaintiff cannot point to any evidence of discrimination, the plaintiff must establish that he was the better qualified candidate for the position sought"

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3. In this case, however, it is of no significance whether Petitioner bears the burden of proving that discrimination was the real reason for Respondent's decision, since Petitioner failed to satisfy even the first prong of proving pretext, that the proffered reason was false. (Petitioner's Appendix, p. 16a).

to raise an inference of discrimination sufficient to survive summary judgment. (Petitioner's Appendix, p. 14a (citing *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996))). In an attempt to support his claim that he was the better qualified candidate, Petitioner offered evidence of his educational background, number of years of experience, and favorable performance evaluations. Such evidence showed nothing more than the fact that he was qualified for the position, a point that Respondent has never disputed. It did not show that he was *more* qualified for the position than Ms. Bergeron. The only "evidence" of his superior qualifications was Petitioner's own unsubstantiated opinion, which the District Court held, and the Fourth Circuit affirmed, did not have sufficient probative force to create a genuine issue of material fact. (Petitioner's Appendix, p. 15a (citing *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 245 (4th Cir. 1982)). The hiring committee determined that Ms. Bergeron was the best qualified candidate for the position, and the District Court correctly noted that "while Cox believes that his thirty-two years of service made him more qualified, it is the perception of the decisionmaker which is relevant, not the plaintiff's perception of himself." (Petitioner's Appendix, p. 15a (quoting *Evans* 80 F.3d at 960-961)). Petitioner failed to produce any direct evidence of discrimination, and without evidence that he was, in fact, more qualified than Ms. Bergeron, Petitioner failed to produce evidence of pretext. The court did not disturb the committee's decision and dismissed Petitioner's claims of discrimination as a matter of law.

Petitioner apparently contends that by rejecting his personal opinion as to his qualifications for the position, and by accepting the hiring committee's decision, the Fourth Circuit and District Court resolved issues of fact and credibility in violation of Rule 56 of the Federal Rules of Civil Procedure, thus denying him his right to a jury trial. However, while all reasonable inferences are to be drawn in favor of the non-moving party, a plaintiff cannot survive summary judgment "through mere speculation or the building of one inference upon another." *O'Connor v. Consolidated Coin*

Caterers Corp., 56 F.3d 542, 545 (4th Cir. 1995), *rev'd on other grounds*, 116 S. Ct. 1307 (1996).

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In this case, there were no issues of material fact to be resolved at trial, thus Petitioner was not denied his right to a jury trial.

CONCLUSION

The District Court engaged in an extensive and well-reasoned analysis of the evidence and rightfully concluded that Petitioner did not and could not satisfy his burden of proof. The Fourth Circuit agreed. The petition does not implicate any of the customary reasons set forth in Supreme Court Rule 10 for this Court to grant a writ of certiorari, such as a conflict with a decision of this Court. There is no evident reason to grant the writ of certiorari, and it should be denied.

Respectfully submitted,

JIM D. COOLEY
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